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Supreme Court U.S.
FILED

No. _____

IN THE 94 638 OCT - 7 1994

SUPREME COURT OF THE UNITED STATES

October Term, 1994

OFFICE OF THE CLERK

STATE OF MICHIGAN,
DEPARTMENT OF MENTAL HEALTH,
Petitioner,

v

LOUISIANA HOMES, INC., and
AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES
(AFSCME),
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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122 pp

QUESTION PRESENTED

DOES THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 151 ET SEQ. (NLRA), PREEMPT STATE COURT JURISDICTION ASSERTED PURSUANT TO SECTION 164 OF THE NLRA OVER A UNION PETITION FOR ELECTION FILED UNDER STATE LAW, WHERE THE NATIONAL LABOR RELATIONS BOARD (OR REGIONAL DIRECTOR) HAS NOT DETERMINED ITS OWN JURISDICTION OVER THE MATTER AND THE NLRB HAS ASSERTED JURISDICTION IN SIMILAR CASES?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INDEX OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 3

STATUTE INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT

I THE MICHIGAN COURT OF APPEALS DECISION IMPROPERLY USURPS THE NATIONAL LABOR RELATIONS BOARD'S EXCLUSIVE AUTHORITY UNDER THE NATIONAL LABOR RELATIONS ACT TO DETERMINE, IN THE FIRST INSTANCE, ITS OWN JURISDICTION OVER A LABOR DISPUTE IN SQUARE CONFLICT WITH AN UNBROKEN LINE OF CASES OF THIS COURT 16

II THIS COURT'S REVIEW IS NEEDED TO RESOLVE THE INCREASING CONFLICTS AMONG STATE COURTS AS TO WHETHER THEY OR THE NLRB MAY DECIDE JURISDICTIONAL QUESTIONS IN THE FIRST INSTANCE 32

Page

III IF THIS COURT DOES NOT CLARIFY THAT THE NLRB MAKES ITS OWN JURISDICTIONAL DECISIONS, A UNIFORM NATIONAL LABOR POLICY IS PUT IN JEOPARDY 47

RELIEF SOUGHT 51

INDEX OF AUTHORITIES

Pages

Cases

AFSCME v. Louisiana Homes, Inc., 192 Mich. App. 187 (1991) 14

AFSCME v. Louisiana Homes (ON REMAND), 203 Mich. App. 213 (1994) 2,14

Bethlehem Steel Co. v. NY State Labor Relations Board, 330 U.S. 767 (1946) 23,30,47

Cox's Food Center v. Retail Clerks Union, 91 Idaho 274; 420 P.2d 645 (1966) 41

Evangeline Downs v. Pari-Mutuel Clerk's Union of Louisiana, 119 So.2d 358 (1966) 33,41

Glen Manor Home for the Jewish Aged, 474 F.2d 1145 (6th Cir. 1973) 19,21,23

Hicks v. N.L.R.B.,964 F.2d 11 (D.C. Cir. 1992) 48

Human Development Assn. v. N.L.R.B., 937 F.2d 657 (D.C. Cir. 1991) 28

In the Matter of Employees of Student Services, Inc., 49 Pa. Commw. Ct. 126; 435 A.2d 297 (1981) 43,44

International Longshoremen's Assn. v. Davis, 476 U.S. 380 (1986) .....passim

Pages

Retail, Wholesale, & Dept. Store Union, AFL-CIO v. N.L.R.B., 745 F.2d 358 (6th Cir. 1984) 23

Rural Fire Protection Co., 216 N.L.R.B. 584; 88 L.R.R.M. 1305 (1975) 48

Russell v. Electrical Workers Local 569, 64 Cal. 2d 22; 48 Cal. Rptr. 702; 409 P.2d 926 (1966) .....passim

St. Jude Industrial Park Board, 265 N.L.R.B. 597; 112 L.R.R.M. 1105 (1982) 48

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) .....passim

Stryjewski v. Local Union No. 830, 426 Pa. 513; 233 A.2d 264 (1967) 33,43

Vegas Franchises v. Culinary Workers Union, 83 Nev. 236; 427 P.2d 959 (1967) 41

Statutes

28 U.S.C. § 1257 3

29 U.S.C. § 151 ET SEQ. .....passim

29 U.S.C. § 152(2) 17

29 U.S.C. § 164 (c)(1) & (2) .....passim

Pages

International Union of Operating Engineers, Local No. 3 v. Bing Construction Co. of Nevada, 90 Nev. 183; 521 P.2d 1231 (1974) 32,35,36,39,40

Local No. 207 v. Perko, 373 U.S. 701 (1963) 30,47

Long Stretch Youth Home, Inc., 280 N.L.R.B. 678; 122 L.R.R.M. 1272 (1986) 17,28

Marine Engineers Beneficial Assn. v. Interlake Steamship Co., 370 U.S. 173 (1962) .....passim

Mayflower Contract Services v. N.L.R.B., 982 F.2d 1221 (8th Cir. 1993) 28

Mich. Council 25, AFSCME v. Louisiana Homes, 192 Mich. App. 187; 480 N.W.2d 280 (1991) 11

Mich. Council 25 v. Louisiana Homes, 440 Mich. 879 (1992) 12

N.L.R.B. v. Parents & Friends of Specialized Living Center, 879 F.2d 1442 (7th Cir. 1989) ...17,28

N.L.R.B. v. West Side Carpet Cleaning, 329 F.2d 758 (6th Cir. 1964) 22,24

National Transportation Service, 240 N.L.R.B. 565; 100 L.R.R.M. 1263 (1979) 48

Res-Care, Inc., 280 N.L.R.B. 670; 122 L.R.R.M. 1265 (1986) 28

Pages

MICH. COMP. LAWS 330.116 5

MICH. COMP. LAWS 330.1228 6

MICH. COMP. LAWS 423.1 et seq. 6

MICH. COMP. LAWS 423.201 6

38 Fed. Reg. 9507 (1973), codified at 29 C.F.R. § 103.3 (1982) 22

OPINIONS BELOW

The Michigan Employment Relations Commission (MERC) issued a decision and direction of election, pursuant to state law, on January 27, 1989. App. to Pet., pp 32a-61a.

The Michigan Court of Appeals affirmed MERC's decision on September 6, 1991. App. to Pet., pp 19a-31a.

The Michigan Supreme Court denied the Michigan Department of Mental Health's (MDMH) application for leave to appeal on July 31, 1992.

The Michigan Supreme Court granted MDMH's motion for reconsideration of the July 31, 1992, order, vacated the judgment of the Court of Appeals, and remanded the case for consideration of the question whether state jurisdiction

is preempted by federal labor law by order dated November 17, 1992. App. to Pet., pp 17a-18a.

The opinion of the Court of Appeals, AFSCME v. Louisiana Homes (ON REMAND), 203 Mich. App. 213 (1994), issued November 3, 1993, is reproduced in the Appendix beginning on page 2a.

The Michigan Supreme Court denied MDMH's application for leave to appeal, with three dissenting votes, by order dated July 12, 1994. App. to Pet., p 1a.

JURISDICTION

Petitioner seeks review of the November 3, 1993, opinion of the Court of Appeals from which the Michigan Supreme Court denied application for leave to appeal on July 12, 1994.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

STATUTE INVOLVED

29 U.S.C. § 164 (c)(1) & (2)

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

STATEMENT OF THE CASE

Over the past several years, much union effort in the State of Michigan has been focused on attempting to organize the direct care workers of numerous group homes providing residential services to mentally handicapped and developmentally disabled individuals. The Michigan Department of Mental Health (MDMH) contracts with both private, nonprofit corporations and local county community mental health (CMH) boards to provide the services. The CMH boards either provide the services themselves, or contract with public or private corporate entities to provide the services. The MDMH and the CMH boards are authorized by statute to enter into these contractual relationships. MICH. COMP. LAWS 330.116 and

MICH. COMP. LAWS 330.1228, respectively. There are hundreds of group homes statewide employing several thousand direct care workers.

The American Federation of State, County and Municipal Employees (AFSCME) is the union primarily engaged in the campaign to organize the workers at issue. On January 29, 1988, Respondent AFSCME filed a petition for election with the Michigan Employment Relations Commission (MERC) pursuant to state labor law. MICH. COMP. LAWS 423.201 and MICH. COMP. LAWS 423.1 et seq.

AFSCME sought to represent the direct care workers of Louisiana Homes, Inc., a private, nonprofit corporation which operates three group homes for the mentally ill pursuant to a contract with

another private, nonprofit corporation, Residential Care Alternatives, Inc. (RCA). RCA purchases residential services from dozens of licensed nonprofit providers like Louisiana Homes. RCA is funded to provide oversight and coordination of residential services pursuant to a contract with Wayne County Community Mental Health Board (WCCMHB), an agency of county government. WCCMHB, in turn, receives a major portion of its funding from the State of Michigan pursuant to a contract with MDMH.

Initially, AFSCME named Louisiana Homes as the employer of the subject workers in the petition for election. However, on March 25, 1988, AFSCME filed a second petition with MERC naming Louisiana Homes and MDMH as joint

employers, despite the fact that MDMH is three times removed from any contractual relationship with Louisiana Homes.

The petition came on for hearing before a MERC administrative law judge. Both Louisiana Homes and AFSCME argued that MDMH is a joint employer of the direct care workers employed by Louisiana Homes. MDMH did not participate in the hearing for the reason that it believed Louisiana Homes was the sole employer of the subject employees.

On January 27, 1989, MERC issued its first decision and direction of election. MERC concluded that Louisiana Homes, Inc., and MDMH were joint employers of the direct care workers employed at the three homes operated by Louisiana Homes and directed that an election be con-

ducted to determine whether the eligible employees in question wished to be represented by AFSCME.

On April 19, 1989, MDMH filed a delayed motion for rehearing and reconsideration and brief in support with MERC. MDMH contested the January 27, 1989, determination that it was a joint employer of the direct care workers employed by Louisiana Homes. MDMH contended, inter alia, that it lacked a contractual relationship with Louisiana Homes, Inc., and had no control over the hiring, firing, and other labor relations issues of employees employed by Louisiana Homes.

On April 20, 1989, an election was conducted pursuant to MERC's January 27, 1989, decision and direction of election.

MERC, however, impounded the ballots from the election because of the April 19, 1989, motion filed by MDMH.

On June 18, 1990, MERC denied MDMH's motion for reconsideration. The ballots from the election conducted on April 20, 1989, were directed to be opened and counted. On June 29, 1990, the ballots were counted and AFSCME was certified as the collective bargaining representative of the eligible direct care workers of Louisiana Homes.

On July 9, 1990, MDMH filed in the Michigan Court of Appeals a petition for review from the January 27, 1989, and June 18, 1990, decisions and orders issued by MERC. MDMH requested the court to reverse the decisions and orders entered by MERC which concluded that MDMH

is a joint employer of the direct care workers employed by Louisiana Homes, Inc.

On September 6, 1991, the Michigan Court of Appeals affirmed, upholding MERC's decision that MDMH is a joint employer of the direct care workers employed by Louisiana Homes, even though MDMH is three times removed from Louisiana Homes and has no contractual relationship with the private sector, nonprofit corporation. Mich. Council 25, AFSCME v. Louisiana Homes, 192 Mich. App. 187; 480 N.W.2d 280 (1991). The court stated that "[t]his case is a perfect example of an agency's choice between two reasonably different views." 192 Mich. App. at 193 (footnote omitted).

On September 27, 1991, MDMH filed a motion for rehearing in the Michigan

Court of Appeals. On November 21, 1991, an order was entered denying the motion.

On December 12, 1991, MDMH filed an application for leave to appeal in the Michigan Supreme Court from the September 6, 1991, decision of the Michigan Court of Appeals and the November 21, 1991, order denying rehearing.

On July 31, 1992, the Michigan Supreme Court issued an order denying MDMH's application for leave to appeal. Mich. Council 25 v. Louisiana Homes, 440 Mich. 879 (1992). It is in this order that the issue of MERC's jurisdiction was first presented. The order provides, in part:

> Brickley, Riley, and Griffin, JJ., would grant leave to appeal.
>
> Boyle, J., states as follows:
> I concur in the denial of leave

> because of the absence of a contested record below regarding the merits of the department's status as joint employer, and because the appellant does not here allege that the MERC did not have jurisdiction, nor did it raise the issue by proper motion below.
> Id.

On August 20, 1992, MDMH filed a motion for reconsideration of the Michigan Supreme Court's July 31, 1992, order. MDMH argued for the first time before the Michigan Supreme Court that the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq., preempts MERC and the state courts from asserting subject matter jurisdiction over the election petition seeking to organize private direct care workers.

On November 17, 1992, a unanimous Michigan Supreme Court entered an order GRANTING the MDMH's motion for recon-

sideration, VACATING the Court of Appeals opinion in AFSCME v. Louisiana Homes, Inc., 192 Mich. App. 187 (1991), and REMANDING to the Court of Appeals to consider the NLRA preemption jurisdictional issue in light of International Longshoremen's Assn. v. Davis (Davis), 476 U.S. 380 (1986). (App. to Pet., pp 17a-18a.) Supplemental briefs on the jurisdictional issue were filed by the parties in the Court of Appeals.

On November 3, 1993, the Michigan Court of Appeals issued its decision on preemption which is the subject of this petition. AFSCME v. Louisiana Homes (ON REMAND), 203 Mich. App. 213 (1994). (App. to Pet., pp 2a-16a.) The Michigan Supreme Court, with three dissenting votes, denied MDMH's timely application

for leave to appeal on July 12, 1994. (App. to Pet., p 1a.)

REASONS FOR GRANTING THE WRIT

I

THE MICHIGAN COURT OF APPEALS DECISION IMPROPERLY USURPS THE NATIONAL LABOR RELATIONS BOARD'S EXCLUSIVE AUTHORITY UNDER THE NATIONAL LABOR RELATIONS ACT TO DETERMINE, IN THE FIRST INSTANCE, ITS OWN JURISDICTION OVER A LABOR DISPUTE IN SQUARE CONFLICT WITH AN UNBROKEN LINE OF CASES OF THIS COURT.

The Michigan Court of Appeals has rendered an interpretation of the National Labor Relations Act (NLRA or Act) in derogation of the exclusive power and discretion of the National Labor Relations Board (NLRB) and in conflict with the consistent holdings of this Court. The cases of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959), International Longshoremen's Assn. v. Davis, 476 U.S. 380 (1986), Marine Engineers Beneficial Assn. v.

Interlake Steamship Co., 370 U.S. 173 (1962), and others, all make clear that the question of who is the employer for purposes of collective bargaining is solely for the NLRB to determine in the first instance. Since under section 2 of the NLRA, 29 U.S.C. § 152(2), an agency of the state is exempt from NLRB jurisdiction, the facts and circumstances of this case raise the threshold question whether MDMH, a state agency alleged by AFSCME to be a "joint employer" with Louisiana Homes of its direct care workers, exerts control over the labor relations of Louisiana Homes to such an extent that NLRB jurisdiction should be declined. See, e.g., Long Stretch Youth Home, Inc., 280 N.L.R.B. 678; 122 L.R.R.M. 1272 (1986); N.L.R.B. v. Parents & Friends of Specialized Living Center,

879 F.2d 1442 (7th Cir. 1989). Contrary to the decision below, this threshold question is for the NLRB alone to decide. Only if the NLRB determines that the ties between a governmental entity and a private employer are such that meaningful bargaining by the private employer alone is not possible may its jurisdiction properly be declined. This Court's review of the Michigan court's refusal to honor the NLRB's supremacy in this area is warranted.

Congress has bestowed upon the NLRB a wide range of jurisdiction:

> It is well established that Congress, in passing the National Labor Relations Act, gave and intended to give the board the fullest permissible jurisdiction under the Commerce Clause of the Constitution. N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224, 226, 83 S.Ct. 312, 9 L.Ed.2d 279 (1963); Polish National Alliance v. N.L.R.B., 322 U.S. 643, 647, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944). The

> statutory jurisdiction of the Board extends to all representation questions and unfair labor practices "affecting commerce." 29 U.S.C. §§ 159(c)(1), 160(a).
>
> Glen Manor Home for the Jewish Aged, 474 F.2d 1145, 1148 (6th Cir. 1973).

The immense preemptive power of the NLRB is undeniable and well established in law. In Garmon, this Court made clear that when labor "activity is arguably subject to § 7 or § 8 of the [NLRA], the States, as well as the federal courts, must defer to the exclusive competence" of the NLRB. 359 U.S. at 245. This Court there explained that the NLRB must first determine jurisdiction because to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy. 359 U.S. at 246.

This Court has also made clear that preemption is always a federal question. Davis, supra, at 388. In Davis, the union argued that a supervisor's state law claim against the union was preempted by the NLRA. This Court reaffirmed the principles set forth in Garmon and numerous other cases which stand for the proposition that conduct regulated by the NLRA preempts state law. This is not a question of choice of law even if state law theoretically applies to the conduct at hand. Davis, at 390-391. The question is one of choice of forum. Once an arguable case is made that the conduct is regulated by the NLRA, "then state jurisdiction is extinguished." Id., at 391, 394-395.

In exercising this wide range of jurisdiction, the NLRB may decline to

assert jurisdiction over a particular case. In some instances, for example, the NLRB will decline to assert jurisdiction for the reason that an involved entity does not engage in sufficient interstate commerce. Glen Manor, supra, 1148. For the first 15 years of the NLRB's existence, this was done on an ad hoc case-by-case basis. Id. In 1950, the NLRB began to issue decisions which set forth dollar volume yardsticks to determine whether jurisdiction would be asserted in specific types of cases. Id. For example, in 1967, the NLRB announced that it would assert jurisdiction over proprietary nursing homes doing a minimum gross volume business of $100,000. Id. It is also NLRB policy that it will not assert jurisdiction over nonretail businesses "whose outflow-inflow of inter-

state transactions f[a]ll below the sum of $50,000.00." N.L.R.B. v. West Side Carpet Cleaning, 329 F.2d 758, 760 (6th Cir. 1964).

Moreover, the NLRB may, by rule, declare that it will not assert jurisdiction over a whole category of entities; e.g., horse and dog racing industries. 38 Fed. Reg. 9507 (1973), codified at 29 C.F.R. § 103.3 (1982). This authority to decline jurisdiction for reasons of insufficient commerce is derived from federal statute. 29 U.S.C. § 164(c)(1), supra, p 4.

The danger of the states determining jurisdictional questions in the first instance under various factual scenarios is heightened by the fact that NLRB's power must remain flexible. Bethlehem

Steel Co. v. NY State Labor Relations Board, 330 U.S. 767, 770 (1946). This flexibility cannot be reflected by decisions of the various state courts. Id. Numerous courts recognize that when the NLRB indeed imposes jurisdictional limits on itself, it remains free to change those limits at any time. In Glen Manor, the court stated that "[w]e have held further that the board's assertion of jurisdiction in violation of its own self-imposed yardstick is not improper." 474 F.2d at 1149. This freedom to change its policies extends to decisions involving assertion of jurisdiction over a whole category of entities, or simply ad hoc disregard of monetary jurisdictional limits. See, Retail, Wholesale, & Dept. Store Union, AFL-CIO v. N.L.R.B., 745 F.2d 358 (6th Cir. 1984) (horse and dog

racing industries), and West Side Carpet Cleaning, supra, 760 (ad hoc).

The states are not free to ignore the longstanding discretionary power of the NLRB given by Congress. A state court or agency may assert jurisdiction over labor disputes only when it is clear that the authority has been granted. Although certain exceptions have evolved over the years, these exceptions "have not redefined the nature of that preemption in any way," Davis, at 380 (emphasis in original), nor have they in any way licensed the States to act in the absence of the NLRB's clear determination that the activity is outside the scope of § 7 or § 8 of the NLRA. Garmon, supra, 245-246.

The Michigan Court of Appeals has improperly seized jurisdiction for MERC

over this union representation case. The court did correctly recognize this Court's Davis/Garmon principles and ruled that this case is an arguable case for preemption in which the Board must first decide whether it will assert jurisdiction. 203 Mich. App. at 218-219.

The court, however, then proceeded to reveal that its recognition of these principles of NLRB primacy was mere lip service as it decided that state courts and tribunals may nevertheless assert jurisdiction, despite an arguable case for preemption, when the NLRB "has declined or would decline" to assert jurisdiction. 203 Mich. App. at 219 (emphasis added). As applied in this case, this assertion is fundamentally flawed. First, although a state court

may assert jurisdiction over a labor controversy in which the NLRB "has declined" jurisdiction, this is not such a case. It is undisputed that AFSCME has never filed a representation petition in the federal forum on behalf of the employees of Louisiana Homes, Inc.

Second, although the Court of Appeals states that it derives subject matter jurisdiction over AFSCME's election petition from § 164(c) of the NLRA, the plain language of the statute dictates otherwise:

> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.
> 29 U.S.C. § 164(c)(2)(emphasis added).

Thus, a state court or agency may take jurisdiction, but only when the NLRB has declined to assert jurisdiction pursuant to § 164(c)(1). Because the NLRB has never been so much as approached in this case, § 164(c) is simply not a proper basis for asserting jurisdiction in the face of an admitted "arguable" case of Garmon preemption.

Third, the Court of Appeals has no support for the proposition that a state court may decide whether the NLRB "would decline" to assert jurisdiction over a case which involves an interpretation of the NLRA. The question here is whether Louisiana Homes is an employer under § 2 of the NLRA, given its relationship to MDMH. It is the NLRB, not the state courts, which regularly decides whether

the NLRB will assert jurisdiction over private corporations which have some degree of relationship, however close or distant, to governmental entities. See, e.g., N.L.R.B. v. Parents & Friends of Specialized Living Center, 879 F.2d 1442 (7th Cir. 1989); Human Development Assn. v. N.L.R.B., 937 F.2d 657 (D.C. Cir. 1991); Mayflower Contract Services v. N.L.R.B., 982 F.2d 1221 (8th Cir. 1993); Long Stretch Youth Home, Inc., 280 N.L.R.B. 678; 122 L.R.R.M. 1272 (1986), and Res-Care, Inc., 280 N.L.R.B. 670; 122 L.R.R.M. 1265 (1986). The NLRB has not ceded this decisionmaking to the states.

Over thirty years ago, this Court made clear that interpretation of the NLRA is not for the state or federal courts, but is exclusively within the

domain of the NLRB. Marine Engineers Beneficial Assn. v. Interlake Steamship Co., 370 U.S. 173 (1962). In that case, the Missouri state courts determined that the Marine Engineers Beneficial Association and its Local 101 were not labor organizations within the meaning of § 8 of the NLRA and, therefore, ruled that state jurisdiction was proper. This Court reversed, ruling that the NLRB must first decide who is or is not covered by the Act. 370 U.S. at 184. This Court aptly stated the proposition:

> The need for protecting the exclusivity of NLRB jurisdiction is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the Board. While the Board's decision is not the last word, it must assuredly be the first . . . . "Our concern" here, as it was in the Garmon Case, 359 U.S. at 246, "is with delimiting areas . . . which must be free from state regulation if national policy is to be left unhampered."

370 U.S. at 185-186.

Similarly, in Bethlehem Steel, supra, this Court determined that the question of whether an employee was a foreman under the jurisdiction of the NLRB was for the NLRB to decide, not the state courts. The Court rejected subject matter jurisdiction of the state courts even though New York's statute was similar, if not identical, to the NLRA. Bethlehem Steel, 330 U.S. at 776-777. This Court has reiterated that the question of whether a foreman was an employee or supervisor under the NLRA is arguably one for the Board, and that, therefore, states are ousted of all jurisdiction. Local No. 207 v. Perko, 373 U.S. 701 (1963); Garmon, 359 U.S. at 245-246.

The Michigan Court of Appeals has erroneously ignored precedent of this

Court which establishes the exclusive and primary jurisdiction of the NLRB in furtherance of a consistent national labor policy. The lower court's determination that the NLRB "would have" decided that Louisiana Homes is not an employer under the NLRA, and therefore "would have" declined jurisdiction over AFSCME's petition for election, flies in the face of this Court's pronouncements in Garmon, Marine Engineers, and Davis, and should be reviewed by this Court.

II

THIS COURT'S REVIEW IS NEEDED TO RESOLVE THE INCREASING CONFLICTS AMONG STATE COURTS AS TO WHETHER THEY OR THE NLRB MAY DECIDE JURISDICTIONAL QUESTIONS IN THE FIRST INSTANCE.

In the instant case, the Michigan Court of Appeals purported to follow state court authority in other states which has determined that the state court or tribunal has jurisdiction to decide whether the NLRB "would have" asserted jurisdiction in any given labor dispute. See, International Union of Operating Engineers, Local No. 3 v. Bing Construction Co. of Nevada, 90 Nev. 183, 186; 521 P.2d 1231 (1974); Russell v. Electrical Workers Local 569, 64 Cal. 2d 22; 48 Cal. Rptr. 702; 409 P.2d 926 (1966). These cases, however, conflict with other state court authorities which have correctly

followed this Court's Garmon/Davis principles and have ruled that the question of NLRB jurisdiction must be determined in the first instance by the NLRB. See, Evangeline Downs v. Pari-Mutuel Clerk's Union of Louisiana, 119 So.2d 358 (1966); Stryjewski v. Local Union No. 830, 426 Pa. 513; 233 A.2d 264 (1967). This Court's voice is needed to resolve this conflict and to restore to the NLRB the full breadth of its primary jurisdiction facing increasing erosion in the state courts.

The state courts have generally made decisions under two scenarios. One scenario occurs when the state court is faced with a dollar-volume jurisdictional standard previously set by the NLRB. See, supra, at pp 21-23. The question in

those cases is whether the state court should determine whether the relevant party meets the dollar-volume standard, or whether the NLRB should apply the standards itself and determine whether it will assert jurisdiction.

The second scenario involves labor disputes where, as here, an interpretation of the language of the NLRA is in question. Primarily the disputes involve questions regarding who is or is not protected by the Act, or whether an alleged unfair labor practice is covered by the Act.

Under the second scenario, if the state court has determined that the controversy before it is one arguably protected by § 7 or § 8 of the Act, then consistent with this Court's Davis and

Garmon pronouncements, the state court is required to immediately defer to the NLRB, not attempt to make a determination as to whether the NLRB would or would not assert jurisdiction. No decision of this Court or provision of the NLRA authorizes the exercise of state jurisdiction under this scenario.

While the Michigan Court of Appeals in the instant case began its analysis by correctly determining that this controversy is arguably subject to § 7 or § 8 of the NLRA and therefore should be preempted, the court continued, however, to claim support from two state court jurisdictions as a basis for itself deciding whether the NLRB "would" assert jurisdiction over AFSCME's election petition. See International Union of

Operating Engineers, Local No. 3 v. Bing Construction Co. of Nevada, 90 Nev. 183; 521 P.2d 1231 (1974), and Russell v. Electrical Workers Local 569, 64 Cal. 2d 22; 48 Cal. Rptr. 70?; 409 P.2d 926 (1966). Broad as the rulings in these cases may be, they do not offer the support claimed by the court below.

The sole issue decided in Russell is whether a state court may itself apply the monetary jurisdictional standards set forth by the NLRB pursuant to § 164(c)(1), or whether the parties must file first with the NLRB and allow the NLRB to apply its standards. Id., at 927-928. Following an analysis of the legislative intent of § 164(c); a discussion of the inconsistent application in state courts addressing the issue; and a

report on published "scholarly comment"; the Russell court decided that the state court may "apply" standards which the NLRB has already laid down for its guidance. 409 P.2d 926, 930.

The Russell court then proceeded to rule that "[s]ince plaintiff has failed to establish the business volume of the building owner, we cannot possibly determine whether or not the board would decline to take this case based on the monetary jurisdictional standards set for entities in the nonretail field." 409 P.2d 926, 931. The trial court was directed to dismiss the action. Id.

The Russell court specifically ruled that it was not making a statutory interpretation of the NLRA:

> In the present situation . . . we ourselves make no such determination

> as to the operative provisions or the coverage of the Act. We do not undertake to interpret statutory language whose construction Congress has committed to the board. We do not propose to substitute for that of the board our own view of the coverage of the Act. Rather, we seek only to apply standards which the board has laid down for its guidance, and, we believe, for ours.
> Id., at 930.

See also, Marine Engineers, supra.

The Michigan Court of Appeals failed to make the distinction made by the Russell court. The Russell case involved monetary jurisdictional standards which the court decided it would itself apply if it had sufficient evidence before it. The Russell court specifically stated that if the question was one of statutory interpretation, such as who is or is not covered by the Act, it would defer to the NLRB. This Louisiana Homes case in fact

involves the kind of question the Russell court recognized was reserved to the NLRB, that is whether Louisiana Homes is covered under the Act.

In the other case relied on by the Michigan court, Bing Construction, the Nevada state district court granted the construction company's motion for a preliminary injunction prohibiting picketing and interference with its building material plant. The appellant union asserted that the district court did not have jurisdiction over the controversy and that the NLRB had exclusive jurisdiction. Following a discussion of the rules of preemption, the court concluded that it was "arguable" that the facts showed a labor dispute within the meaning of the relevant definition section of the NLRA,

§ 152(9), and directed the district court to dissolve the injunction and dismiss the case for want of jurisdiction. 521 P.2d 1231, 1233.

It is not surprising that the Bing Construction court correctly dismissed the case and stated the following regarding § 164(c):

> There is nothing in this record which would indicate that the National Labor Relations Board would decline to assert jurisdiction (29 U.S.C. § 164(c)(1)) over this controversy, therefore, the district court was not free to exercise the powers reserved to state courts in 29 U.S.C. § 164(c)(2).
> Id.

That court believed it was following its own Supreme Court in a case where the Supreme Court of Nevada determined that the state courts can apply monetary jurisdictional standards set by the NLRB

over restaurants. Vegas Franchises v. Culinary Workers Union, 83 Nev. 236; 427 P.2d 959 (1967). In Vegas Franchises, the court ruled that the NLRB would decline to assert jurisdiction if the case were before it, thus jurisdiction of the state court was proper. See, contra, Cox's Food Center v. Retail Clerks Union, 91 Idaho 274; 420 P.2d 645 (1966). (Supreme Court of Idaho ruled that NLRB must itself apply the monetary jurisdictional standards set for retail businesses.)

In the state of Louisiana, the courts find that state jurisdiction is improper pursuant to § 164(c) without a prior determination by the NLRB that it declines to assert jurisdiction in each particular dispute. In Evangeline Downs

v. Pari-Mutuel Clerks' Union of Louisiana, 191 So.2d 358 (1966), the court deferred to the NLRB where the employer sought a state court injunction prohibiting picketing by the union. The court stated as follows:

> [W]here a labor dispute falls within the basic pre-emptive jurisdiction of the National Labor Relations Act, the Louisiana courts will not assume jurisdiction over it upon the supposition that the Board will in its discretion decline to exercise jurisdiction as authorized by Subsection c [29 U.S.C. § 164(c)]. Until the Board has declined to assert its basic pre-emptive jurisdiction in the particular dispute in question, the state court does not have jurisdiction of the subject matter.
> Id., at 361 (emphasis added).

One Pennsylvania court has similarly ruled. Even when presented with specific monetary jurisdiction standards, the court defers to the NLRB "until the

United States Supreme Court has spoken directly on this subject." Stryjewski v. Local Union No. 830; 426 Pa. 513; 233 A.2d 264 (1967).

Despite that pronouncement by Pennsylvania's highest court, a lower court of that state made a contrary ruling almost 15 years later. In a case very similar to the instant case, the court made its own decision that the NLRB "would not" assert jurisdiction based upon its reading of previous NLRB decisions. In the Matter of Employees of Student Services, Inc., 49 Pa. Commw. Ct. 126; 435 A.2d 297 (1981). The lower court stated that since the enactment of 29 U.S.C. § 164(c), "[t]he NLRB is thus no longer required to make a formal relinquishment of jurisdiction in order

for the states to acquire the power to adjudicate a labor dispute." Id., at 229. That lower Pennsylvania court read section 164(c) so expansively as to authorize the states to decide for themselves that the NLRB "would not" assert jurisdiction based on nothing more than previous NLRB decisions that originated in other states and in which the NLRB had only declined jurisdiction over the same "type" of employer!

The Michigan Court of Appeals in the instant case has followed the lead of the Pennsylvania court in Student Services. The Court of Appeals below determined that since the NLRB declined jurisdiction in two other cases involving the same "type" of employer, it "would" also decline jurisdiction in this case. 203

Mich. App. at 220-221. This legally flawed rationale improperly wrests jurisdiction from the NLRB contrary to this Court's teachings.

The state courts are in conflict regarding the extent of their freedom to circumvent the NLRB's jurisdiction by ordaining whether the NLRB "would assert" or "would decline" jurisdiction. Even if justification may be found for the exercise of state power to apply, in particular cases, the monetary standards set down by the NLRB, any rationale that might support the exercise of such ministerial power cannot apply to support so discretionary a power as interpreting the scope of NLRA coverage. The Michigan Court of Appeals did just that in relying on Russell to extend the reach of the

states beyond cases where the NLRB has set monetary amounts to usurp the Board's exclusive authority to interpret the NLRA as well. Interpretation of the NLRA is not for the state courts; while the "Board's decision is not the last word, it must assuredly be the first." Marine Engineers, 370 U.S. at 185-186. This Court's consideration is needed to resolve this conflict.

III

IF THIS COURT DOES NOT CLARIFY THAT THE NLRB MAKES ITS OWN JURISDICTIONAL DECISIONS, A UNIFORM NATIONAL LABOR POLICY IS PUT IN JEOPARDY.

The majority of the cases cited herein regarding the question of who makes the threshold jurisdictional decision under the NLRA are now over 25 years old. The cases generated by this Court are consistent in upholding congressional intent to establish the primary and exclusive jurisdiction of the NLRB. Particularly, in Marine Engineers, Perko, Bethlehem Steel and Davis, this Court ruled that statutory construction of the NLRA in terms of who is or is not covered by the Act is for NLRB to decide, not the state, or even the federal courts.

If the instant Louisiana Homes deci-

sion is left intact, it will open the door for erosion of the power and authority of the NLRB in the state of Michigan and in other states. The NLRB clearly has not relinquished its authority to decide whether it will assert jurisdiction over employers with a relationship, however distant, to a governmental entity. Jurisdictional tests for this question have been developed and shaped by the NLRB over many years for application by the NLRB. Rural Fire Protection Co., 216 N.L.R.B. 584; 88 L.R.R.M. 1305 (1975), National Transportation Service, 240 N.L.R.B. 565; 100 L.R.R.M. 1263 (1979), St. Jude Industrial Park Board, 265 N.L.R.B. 597; 112 L.R.R.M. 1105 (1982), Hicks v. N.L.R.B., 964 F.2d 11 (D.C. Cir. 1992), and cases cited supra at p 28. Over the past decade, numerous

decisions have been made by the NLRB involving corporations with ties to governmental entities. Id.

In Louisiana Homes, the court below did not even concern itself with applying the relevant NLRB test. The court simply assumed that the facts of this case are identical to two previous cases decided by the NLRB involving MDMH and group home providers, now several years old, and declared that since the NLRB declined jurisdiction in those cases, it "would decline" jurisdiction in this one.

The outcome of this case will have a profound effect on the direction of labor law in the state of Michigan. Since the petition for election was filed with MERC in Louisiana Homes, AFSCME has filed numerous other petitions naming MDMH as a

joint employer with the corporate group home provider. If left intact, this decision will give MERC and the state courts jurisdiction over labor controversies involving thousands of employees in hundreds of group homes. If the NLRB does not wish to assert jurisdiction over that mental health delivery system as a whole, and give state courts jurisdiction, or if it wishes to decide by itself on a case-by-case basis, this Court has made clear that it is within the exclusive power and authority of the NLRB to do so.

RELIEF SOUGHT

Wherefore, this Court should grant certiorari to review the decision of the Michigan Court of Appeals and rule that the NLRA preempts state court jurisdiction when the NLRB has not determined its own jurisdiction in the matter.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

	Page
Michigan Supreme Court order dated July 12, 1994	1a
Michigan Court of Appeals opinion dated November 3, 1993 ...	2a
Michigan Supreme Court order dated November 17, 1992	17a
Michigan Court of Appeals opinion dated September 6, 1991 ..	19a
Michigan Employment Relations Commission decision dated January 27, 1989	32a

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: July 12, 1994

MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME),

Petitioner-Appellee,

v

LOUISIANA HOMES, INC.,

Respondent-Appellee,

and

STATE OF MICHIGAN, DEPARTMENT OF MENTAL HEALTH,

Respondent-Appellant.

SC: 98221
COA: 158504
LC: MERC
88-000038

/

On order of the Court, the application for leave to appeal is considred, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Levin, Brickley and Griffin, JJ., would grant leave to appeal.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 12, 1994 /s/Jacqueline B. MacKinnon
Deputy Clerk

STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN COUNCIL 25,
AMERICAN FEDERATION OF
STATE, COUNTY AND
MUNICIPAL EMPLOYEES
(AFSCME)

Petitioner-Appellee,

v

LOUISIANA HOMES, INC.

Respondent-Appellee,

and

STATE OF MICHIGAN,
DEPARTMENT OF MENTAL
HEALTH,

Respondent-Appellant.

November 3, 1993
FOR PUBLICATION-
1/13/94 9:05 a.m.
No. 158504
MERC No. 88-000038
ON REMAND

ON REMAND

Before: Holbrook, Jr., P.J. and SULLIVAN and JANSEN, JJ.

PER CURIAM. This case is before us on remand from our Supreme Court. In a prior opinion, we upheld a Michigan Employment Relations Commission's finding that respondent, Michigan Department

of Mental Health (DMH) is a joint employer with respondent Louisiana Homes, Inc., a nonprofit residential home care provider, of the direct-care workers at three Louisiana Homes facilities. Michigan Council 25, AFSCME v Louisiana Homes, Inc, 192 Mich App 187; 480 NW2d 280 (1991). Following our decision, the DMH filed an application for leave to appeal to our Supreme Court which was originally denied, 440 Mich 879 (1992); however, after the DMH filed a motion for reconsideration, raising for the first time the issue of lack of jurisdiction by virtue of federal preemption under the National Labor Relations Act, 29 USC 141 et seq., our Supreme Court vacated our prior opinion and remanded the case to this Court for "consideration of the jurisdictional question in light of Int'l

Longshoremen's Ass'n v Davis, [476 US 380; 106 S Ct 1904; 90 L Ed 2d 389 (1986)]." 441 Mich 883 (1992). We conclude that the MERC had jurisdiction to decide this case, and, therefore, we reaffirm our prior opinion.

Subject to limited exception, when an activity is "arguably" subject to the provisions of the NLRA, states must defer to the exclusive competence of the National Labor Relations Board. Davis at 381, 394; San Diego Building Trades Council v Garmon, 359 US 236, 245; 79 S Ct 773; 3 L Ed 2d 775 (1959). When a party asserts that state proceedings are preempted because the conduct at issue is within the purview of the NLRA, the claim represents a challenge to the subject matter jurisdiction of the state court or tribunal; it is "a claim that the state court has no power to adjudi-

cate the subject matter of the case." Davis at 393. Thus, when a claim of NLRA preemption is raised, Davis directs that "it must be considered and resolved by the state court." Id. The issue of NLRA preemption having been raised here by the DMH, we are now called upon to consider and resolve it.

In the instant case, the petitioner filed a petition with the MERC seeking certification as the collective bargaining agent for certain workers who provide direct care to mentally ill or mentally retarded persons in three residential facilities operated by Louisiana Homes. The DMH was named as a joint employer of the direct-care workers. Following a hearing, the MERC found that, given the extent of the DMH's power and control over employment matters involving the direct-care workers,

it was a joint employer along with Louisiana Homes of the direct-care workers. The facts of this case relative to the relationship between the DMH and Louisiana Homes, and the extent of the DMH's power and control over employment matters involving the Louisiana Homes direct-care workers, are set forth in our prior opinion. Louisiana Homes, supra, 192 Mich App 187.

In this case, resolution of the NLRA preemption issue turns on the status of the relationship between the DMH and Louisiana Homes.

An "employer" subject to the provisions of the NLRA does not include a "State or political subdivision thereof." 29 USC 152(2). The parties do not dispute that the DMH, because it is a department created directly by the

state, is an exempt political subdivision. See NLRB v Natural Gas Utility Dist of Hawkins County, 402 US 600, 604-605; 91 S Ct 1746; 29 L Ed 2d 206 (1971). In the context of the "political subdivision" exemption, the NLRB has recognized that an otherwise statutory employer may also be exempt from the NLRB's jurisdiction if an exempt governmental entity exerts a substantial degree of control over it. Human Development Ass'n v NLRB, 290 US App DC 339, 342-343; 937 F2d 657 (1991), cert den __ US __; 112 S Ct 1512; 117 L Ed 2d 649 (1992); NLRB v Parents & Friends of the Specialized Living Center, 879 F2d 1442, 1449 (CA 7, 1989); Res-Care, Inc v Indiana Joint Bd, Retail, Wholesale & Dep't Store Union, 280 NLRB 670 (1986). See also Long Stretch Youth Home, Inc v Maryland State

Employees Council 92, 280 NLRB 678 (1986). In deciding whether an employer is exempt from the NLRB's jurisdiction because of its ties to an exempt governmental entity, the NLRB examines "not only the control over essential terms and conditions of employment retained by the employer, but also the scope and control exercised by the exempt entity over the employer's labor relations, to determine whether the employer in issue is capable of engaging in meaningful collective bargaining." Res-Care at 672.

We disagree with the petitioner's contention that resolution of the preemption issue is controlled by the MERC's finding that the DMH and Louisiana Homes are joint employers. Davis makes clear that it is not within the competence of a state court to adju-

dicate whether a particular case falls within the purview of the NLRA. Davis at 390, 397. Quoting from Garmon, the Davis Court stated, "It is essential to the administration of the [NLRA] that these determinations be left in the first instance to the [NLRB]." Id. at 390. According to Davis, when faced with a preemption claim, the court must first "decide whether there is an arguable case for pre-emption; if there is, it must defer to the Board, and only if the Board decides that the conduct is not protected or prohibited may the court entertain the litigation." Id. at 397. Thus, in this case, resolution of the preemption issue depends not on whether the DMH and Louisiana Homes are joint employers under state law as the MERC decided but on whether this case is "arguably" one where the NLRB, applying

its own standards, could legally decide to assert jurisdiction over Louisiana Homes. Cf. Davis at 395.

The record in this case indicates that, while the DMH exercises significant control over various aspects of Louisiana Homes' labor relations, Louisiana Homes continues to retain some control over essential terms and conditions of employment. Whether or not the control retained by Louisiana Homes over employment matters rises to a level such that the NLRB could legally decide to assert jurisdiction over it notwithstanding the control over labor relations exercised by the DMH is, in our view, at least arguable.

Nonetheless, notwithstanding our conclusion that an "arguable" case for preemption exists, if it can be shown

that the NLRB, within its discretion as provided in § 164(c) of the NLRA,[1] has declined or would decline to assert jurisdiction, then a state court or tribunal would be free to assert its jurisdiction. Int'l Union of Operating Engineers, Local No 3 v Bing Construction Co of Nevada, 90 Nev 183, 186; 521 P2d 1231 (1974); Russell v Electrical Workers Local 569, 64 Cal 2d 22, 25; 48 Cal Rptr 702; 409 P2d 926 (1966). In order to prevent fruitless submissions to the NLRB, it is not necessary under § 164(c) for a party to first submit a given case to the NLRB for a determination of the jurisdictional question; rather, a party need only show on the basis of "rule of decision or by published rules" that the NLRB has or would have declined jurisdiction. 29 USC 164(c)(1); Russell, supra at 25. In

ruling on such a claim, a state court would not be determining "the operative provisions or the coverage of the [NLRA]," nor substituting its own view "for that of the Board." Id. at 28. Rather, it would merely be "apply[ing] standards which the Board has [already] laid down." Id.

Here, although the parties did not raise the issue of NLRA preemption before the MERC, the issue did not go unaddressed. Our review of the MERC's written decision discloses that the MERC recognized that its jurisdiction might be questioned, and, therefore, it, sua sponte, undertook to address the issue of NLRA preemption before proceeding to a decision on the merits. In addressing the preemption issue, the MERC noted that twice before labor disputes involving the DMH and an employer health-care

institution like Louisiana Homes had been submitted to the NLRB.[2] In both cases, the MERC noted, the DMH exercised control over the employer's labor relations pursuant to the "same type of contract" that exists in this case. Both cases resulted in decisions wherein the NLRB declined to assert jurisdiction on the basis that extensive control by the DMH over the employer's labor relations made meaningful bargaining impossible.

Because the DMH is the same governmental entity and Louisiana Homes is the same type of employer as was involved in each of these other cases, and because the control exercised by the DMH over the Louisiana Homes' direct-care workers is governed by the same type of contract that existed in these other cases, we agree with the MERC that a sufficient

showing has been made that the NLRB would similarly refuse to assert jurisdiction over the labor dispute in this case. Therefore, under 29 USC 164(c)(2), the MERC was free to assert its jurisdiction. Again, our resolution of this issue stems not from our own interpretation of the NLRA, but from our application of the NLRB's own decisions under like circumstances.[3]

Accordingly, we find, as did the MERC, that state jurisdiction was not lacking because of preemption under the NLRA, and, therefore, the MERC had jurisdiction to decide this case. In view of this conclusion, we hereby reaffirm our prior opinion.

Affirmed.

---

[1]29 USC 164(c) provides:

(1) The Board, in its discretion, may, by rule of decision or by published

rules . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . .

(2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

[2]See Residential Systems, Inc, unpublished decision of the NLRB Seventh Region Director, decided April 7, 1988 (Case No. 7-RC-18529) and C K Homes, unpublished decision of the NLRB Seventh Region Director, decided February 14, 1986 (Case No. 7-RM-1275). The decision in each case was issued by the regional director under authority granted by 29 USC 153(b).

[3]We disagree with the DMH's contention that more recent authority renders the decisions in C K Homes and Residential Systems, n 2 supra, suspect. Although, as the DMH points out, C K Homes was decided before the decisions in Res-Care and Long Stretch Youth Home were issued, Residential Systems was decided after each of these cases and, as the MERC noted, the same result was reached in Residential Systems as had been reached in C K Homes after expressly applying the standards enunciated in Res-Care. Nor do we believe that the propriety of C K Homes and Residential Systems is affected by the decisions in Parents &

Friends and Human Development Ass'n, supra. Although each of those cases involve situations where the NLRB elected to assert jurisdiction over an employer with close ties to an exempt government entity, the decisions were reached applying the same Res-Care standards that were applied in Residential Systems.

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: November 17, 1992

MICHIGAN COUNCIL 25, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME),

Petitioner-Appellee,

v

SC: 92938
COA: 130650
LC: MERC

LOUISIANA HOMES, INC.,

Respondent-Appellee,

and

STATE OF MICHIGAN, DEPARTMENT OF MENTAL HEALTH,

Respondent-Appellant.

_____/

On order of the Court, the motion for immediate consideration is GRANTED. The motion for reconsideration of this Court's order of July 31, 1992 is also considered and the motion is GRANTED. On reconsideration, the appellant having raised the issue of jurisdiction, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and

REMAND the case to the Court of Appeals for consideration of the jurisdictional question in light of International Longshoremen's Ass'n v Davis, 478 US 380; 106 S Ct 904; 90 L Ed 2d 389 (1986).

We do not retain jurisdiction.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 17, 1992

/s/Jacqueline B. MacKinnon
Deputy Clerk

STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN COUNCIL 25,
AMERICAN FEDERATION OF
STATE, COUNTY AND
MUNICIPAL EMPLOYEES
(AFSCME)

Petitioner-Appellee,

v

LOUISIANA HOMES, INC.

Respondent-Appellee,

and

MICHIGAN DEPARTMENT
OF MENTAL HEALTH,

Respondent-Appellant.

September 6, 1991
FOR PUBLICATION-
12/12/91 9:00 A.M.
No. 130650

Before: Holbrook, Jr., P.J., and Sullivan and Jansen, JJ.

SULLIVAN, J. Respondent Michigan Department of Mental Health (DMH) appeals as of right the Michigan Employment Relations Commission's finding that the DMH is a joint employer along with respondent Louisiana Homes, Inc., a nonprofit residential home care

provider, of the direct-care workers in the three Louisiana Homes facilities. The direct result of such a finding, if affirmed, is that the DMH will be required to bargain in good faith with the representative of the employees of Louisiana Homes, petitioner Michigan Council 25, American Federation of State, County, and Municipal Employees. We affirm.

The state of Michigan is responsible for providing mental health care services. Oakland Co v Dep't of Mental Health, 178 Mich App 48, 443 NW2d 805 (1989). In this case, the DMH contracted with Detroit-Wayne County Community Mental Health (CMH) for CMH to deliver those services, including residential facilities for mentally ill and mentally retarded persons, in Wayne County. CMH, in turn, contracted with

Michigan Residential Care Alternatives (MRCA) for RCA to operate the residential facilities for mentally ill and mentally retarded persons in accordance with the DMH and CMH guidelines. MRCA is a private, nonprofit organization whose membership includes residential care providers. RCA does not operate residential facilities, but instead is primarily a lobbying organization. In this case, RCA then contracted with Louisiana Homes to provide the residential services to mentally ill and mentally retarded persons.

On January 29, 1988, AFSCME filed a petition to be certified to represent, for collective bargaining purposes, direct care workers, except administrators, department heads, and supervisors, of the three Louisiana Homes locations naming Louisiana Homes as the employer.

A second petition was thereafter filed, adding the State of Michigan--the DMH--as a joint employer. The DMH, through the Attorney General, responded that it did not think that the MERC had jurisdiction of this matter and that it was not going to attend the hearing. Following a hearing before a hearing referee, at which AFSCME and Louisiana Homes were represented, the MERC found, in pertinent part, that Louisiana Homes and the DMH are joing employers of the direct-care workers.

Even though it did not participate in the hearing or in submitting post-hearing briefs, the DMH filed a delayed motion for rehearing and reconsideration, in which it requested that the hearing be reopened for the taking of additional evidence. The MERC ultimately denied the State's motion. The

DMH now appeals the finding that it is a joint employer of the direct-care workers of Louisiana Homes.

On appeal, AFSCME argues that by failing to participate in the MERC hearing, the DMH waived any objection it has to the MERC's finding that the DMH is a joint employer. We disagree. Even though the DMH did not participate in the proceedings, it nevertheless is an aggrieved party.

A MERC decision authorized by law will be affirmed if the factual findings by the MERC are supported by competent, material, and substantial evidence on the whole record. Senior Accountants, Analysts & Appraisers Ass'n v Detroit, 184 Mich App 551, 556-557; 459 NW2d 15 (1990). "Substantial evidence" means more than a scintilla, but substantially

less than a preponderance, of the evidence. Id. Our review must accord due deference to administrative expertise and should not invade the province of exclusive administrative fact-finding by displacing the agency's choice between two reasonably different views. Id.

On appeal, the DMH contends that the MERC's finding that the DMH is a joint employer was not supported by competent, material and substantial evidence. We disagree. Precedent has been established for the recognition of coemployer status in collective bargaining. See St Clair Prosecutor v AFSCME, 425 Mich 204; 388 NW2d 231 (1986). The general characteristics of employers are: (1) they select and engage the employee; (2) they pay the wages; (3) they have the power of dismissal; and (4) they have power

and control over the employee's conduct. Saginaw Stage Employees Local 35, IATSE v Saginaw, 150 Mich App 132, 134-135; 387 NW2d 859 (1986).

Before summarizing the evidence presented below, we note that full factual development was somewhat thwarted by the DMH's failure to participate.

The testimony taken before the administrative law judge and the exhibits admitted revealed the following. In general, the mandatory guidelines for operating a residential care facility are established by the DMH, and CMH is bound to those guidelines by virtue of its contract with DMH. Therefore, whether a residential care facility operates under a contract with the DMH or CMH, it nevertheless operates, in effect, under budget guidelines, person-

nel decisions and requirements, training requirements and minimum staff qualifications, and contract provisions established by the DMH. Moreover, regardless of which entity the residential care facility contracts with, the facility is state-funded.

With regard to the hiring process, although Louisiana Homes hires its own staff, the DMH established minimum qualifications for employment as a direct-care worker. The hiring decisions are subject to approval by the Department of Social Services as the licensing agency and the contract agency--in this case CMH.

Moreover, the DMH established training requirements for the direct-care workers. The DMH requires 120 hours of training for direct-care staff who will

be working in residential care facilities and annual training after the first year of employment. In this case, although CMH provided the training because it is the contract agency, the DMH participated in developing and maintaining the curricula for entry level and annual training. The DMH requires a staff person to satisfactorily complete the training program in order to continue employment. In addition, the training requirements of the DSS, as the licensing agency of all residential facilities, can be met through CMH training.

Each facility has its own budget. With regard to payment of direct-care workers, they are paid almost entirely, if not entirely, with state funds. The DMH establishes a maximum hourly rate in order to determine how much each facil-

ity will be given for personnel costs. If the provider opts to pay a worker more than the maximum hourly rate established by the DMH, another worker would, of necessity, be paid less. No transfer of funds to personnel from elsewhere in the budget is permitted, except for the amount allocated for administration. However, the amount allotted for administration is so low that the administrative costs typically use up "at least" the amount allocated for them. Moreover, the DMH does not permit funds to be transferred from the budget of one facility to another. The staffing levels of each provider is established by the contract agency--in this case CMH--on the basis of the needs of the recipients in the facility.

Little testimony was elicited, however, regarding the two remaining

characteristics of being an employer--the power of dismissal and control over the employee's conduct. Testimony did show that where an allegation of abuse of a resident of a facility is made, the Office of Recipient Rights of the contract agency, i.e., either the DMH or CMH, investigates. If that office recommended that the employee involved be discharged, the facility's contract would be in jeopardy if the employee was not discharged from employment, even if the facility's investigation reached a different result. Furthermore, documents admitted as evidence show that some of the day-to-day activities of Louisiana Homes' direct-care workers are controlled by the DMH by virtue of its mandatory guidelines regarding meal patterns, meal preparations and service, sanitation and safety, staff garments and hair, and recipient rights.

The main witness at the hearing, Robert Stein, the executive vice president of MRCA, concluded that regardless of whether a facility contracts with the DMH or a county community health board, "the guidelines for contracting in terms of the budget and Schedule A [personnel budget] and personnel decisions and requirements and training requirements are the same."

Having reviewed the evidence in this case, the MERC concluded:

> In the instant case, the Department [DMH] has extensive control over the hiring requirements of Louisiana although it does not physically hire its employees. It also exerts extensive control, through its rules and regulations, over the day-to-day operations of the home, including the type of work that is done, how it is done, and the conditions under which it is done . . . . We are compelled to conclude, as did the NLRB's Regional Director, that the Department's control over Louisiana's operations extends far beyond mere licensing requirements or the provision of funds through a grant arrangement. Since the

> Department and Louisiana share authority over Louisiana's employees and their terms and conditions of employment, we conclude that Louisiana and the Department are joint employers of these employees.

We believe that the MERC's finding that the DMH and Louisiana Homes are joint employers was supported by competent, material and substantial evidence, given the hiring and training requirements the DMH imposes, the funding, and the amount of control over the activities of the direct-care workers. This case is a perfect example of an agency's choice between two reasonably different views.[1]

Affirmed.

---

[1] On appeal, the DMH cites a prior MERC decision that, it alleges, came to a different conclusion. Even if it did, the DMH fails to cite any authority supporting the proposition that one MERC panel, or for that matter this Court, must follow a prior MERC decision.

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

LOUISIANA HOMES, INC. AND
STATE OF MICHIGAN, DEPARTMENT
OF MENTAL HEALTH,
Employer

-and- Case No. R88 A-38 &
R88 C-112

MICHIGAN COUNCIL 25,
AMERICAN FEDERATION OF
STATE, COUNTY AND
MUNICIPAL EMPLOYEES
(AFSCME)
Petitioner

_____/

APPEARANCES:

For the Employer: Barry L. Howard, P.C.,
by Barry L. Howard, Esq.

For the Petitioner: L. Rodger Webb, P.C.,
by L. Rodger Webb, Esq.

DECISION AND DIRECTION OF ELECTION

These cases were heard at Detroit, Michigan on March 25, 1988 and May 6, 1988, before an Administrative Law Judge for the Michigan Employment Relations

Commission under the provisions of Section 12 of the Public Employment Relations Act (PERA), 1947 PA 336, as amended by 1965 PA 379 and 1973 PA 25, MCLA 423.212, MSA 17.455(12) and Section 27 of the Labor Mediation Act (LMA), 1939 PA 176, as amended, MCLA 423.27, MSA 17.454(29). Based upon the record and the post-hearing briefs filed by the parties on or about July 20, 1988, the Commission finds as follows:

The Petitions and Background:

In the petition in Case No. R88 A-38 filed by AFSCME on January 29, 1988, Petitioner sought to have the Commission conduct an election pursuant to the provisions of the (LMA) in a bargaining unit of employees of Louisiana Homes, Inc. described as follows:

> All full time and part time direct care workers located at the Employer facilities:
>
> 1) 9601 St. Mary's
> Detroit, MI 48227

2) 614 Golden Gate
Detroit, MI
3) 3055 Hanley
Hamtramck, MI 48212

Excluding all administrators, department heads and supervisors.

The petition came on for hearing on March 25, 1988. Since both the Petitioner and Louisiana Homes, Inc. (Employer) were maintaining that the State of Michigan, Department of Mental Health, was a joint employer, it was agreed at the hearing that the State of Michigan, Department of Mental Health, should be notified through a subsequent petition of the proceedings before MERC. As the result of this agreement, the petition was filed in Case No. R88 C-112 on March 25, 1988, for this same unit, naming Louisiana Homes, Inc. and the State of Michigan, Department of Mental Health, as joint employers. This petition was served upon the State of

Michigan Department of Mental Health. The Commission was subsequently informed by letter dated May 3, 1988 from the Attorney General that it was not the intention of the State of Michigan to participate in the hearing to be conducted before MERC. This letter further stated that the letter should not be taken to imply that the employees in question were State employees or that the State acts as their employer.

The Facts:

Louisiana Homes, Inc., hereinafter referred to as the Employer, is a Michigan non-profit corporation. What the Employer does, how it operates, and how it came about is set forth below.

In 1978 a lawsuit was filed on behalf of patients under the care of the Michigan Department of Mental Health, hereinafter referred to as the Depart-

ment, complaining of the care being given at the Department's Plymouth Center. This lawsuit resulted in a consent decree which was approved by Judge Charles W. Joiner. This decree demanded deinstitutionalized care and provided for a less restrictive residential setting for that care. To implement this, the Department began contracting with the Employer and other private corporations, to provide the care required by the decree. The decree provides how the administration of this care is to be implemented.

The State of Michigan Department of Mental Health contracts with another non-profit Michigan corporation, Residential Care Alternatives (RCA), funded exclusively through Detroit Wayne County Community Mental Health (CMH). RCA then contracts with the Employer.

The terms of the contract between CMH and RCA, and the contract between RCA and Louisiana, are according to provisions established by the Department.

The Employer has three separate contracts with the Department through RCA and CMH. Each contract is for one of the three homes named in the petitions, and each provides a separate budget. Each home, pursuant to its contract, is paid in a separate check issued the Employer, which in turn uses it to pay the expenses of the home. Each home has a separate checking account and separate sets of accounting figures. Money cannot be taken from one home for the expenses of another. The foregoing regulations are enforced under duress of cancellation of the contract. In addition, each home's contract earmarks specific funds for specified items in the

budget. If the budget for that item is underspent, the money is refunded to the State. If the budget for that item is exceeded, the Employer is required to repay the State the amount of the excess.

The Department determines the level of staffing needed for each home and sets the budgeted amount necessary to cover that staffing. This is based on a specified number of full-time or full-time equivalent positions (FTEs). Each home's contract has a budget for personnel who are engaged in patient care. This budget provides a specific amount that is to cover wages, fringe benefits, income tax, social security, workman's compensation and unemployment insurance. The amount of wages paid to each individual employee is not specified. However, any increase in the wages or

benefits paid to an individual employee must be funded by a reduction in the wages or benefits paid to other direct care employees at that home.

The State conducts a comprehensive annual review of the financial records and financial statements of the home to monitor the home's expenditures. If it is found that money has been spent improperly on one category when it is designated for another, the monies must be returned to the State. This is true even if the money was spent for a legitimate activity of the facility. This arrangement prohibits money budgeted for equipment or other non-personnel purposes being used for staff salaries or benefits.

The Employer cannot negotiate the terms of its contracts with the State. If the Employer wishes to undertake

alternate care facilities, it does so according to the Department of Mental Health's standard contract. The Department's contract with the Employer also carries with it the obligation to abide by all rules and regulations of the Department. These rules are at times called guidelines, directives or policy statements. No matter what the name, they are equally mandatory. The regulations cover such items as whether smoking is permitted in the home. Failure to follow any of the regulations may result in the loss of the contract to the home.

Although the actual hiring is done by Louisiana, hiring qualifications are established by the State. All persons hired by the Employer must pass a Department or CMH training course. The employees have a certain number of days

in which to complete this training after they are hired. If the course is not completed, the employee must be discharged. Failure to discharge the employee could, as in other breaches of the contract, result in termination of the contract.

There are Department and CMH personnel policies which must be followed by each home. The State also requires approved plans of service for each patient. These plans must be followed by the employees in caring for the patients.

The Department has an agency called the Office of Recipient Rights (ORR). This agency both protects the patient and sees that the requirements of the Department are carried out. If a complaint is made that a patient's rights were violated, the complaint is filed

with the ORR. It is investigated, and upon completion a recommendation is issued. If the complaint is substantiated and the ORR recommends termination, the employee must be terminated. Again, if the Employer fails to comply, its contract may be cancelled. This is true even in the Employer's own investigation is contrary in result to that of the ORR.

The general duties of the employees are the same in all three homes. As indicated above, many of these duties are dictated by the Department's contracts with the Employer. The record discloses that some employees do work on an emergency basis or fill-in basis in more than one home upon occasion, although they are hired for a specific home.

Discussion and Order:

The dispute between the Petitioner and Louisiana Homes, Inc., is whether the bargaining unit should include all three homes run by Louisiana Homes, Inc., or whether there should be separate bargaining units for each of the three homes. Because employees perform the same duties at all three homes, we believe that the chief reason to create separate units is the State requirement that each home be separately operated. However, if the State is found to be a joint employer with Louisiana, as both the Employer and Petitioner contend, then the separate operating agreements would not provide a justification for dividing the employees into three separate units. In line with our policy of maximizing the size of the unit by including all employees who share a com-

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munity of interest, we generally place all employees of the same Employer who perform the same job duties in the same unit. Thus, if the State and Louisiana are joint employers of employees at all three homes, a single unit is appropriate.

The threshold questions in this case, however, are whether the State Department of Mental Health is in fact a joint employer with Louisiana of the employees in question and, secondly, whether we have jurisdiction over the Department and/or Louisiana in this case.

Louisiana has not disputed our jurisdiction over it in this case. It is important to note, however, that the National Labor Relations Board (NLRB) has refused to assert jurisdiction over homes operating under the same type of

contract which exists between the Employer and the Department in this case. In Residential Systems, Inc, Case No. 7-RL-185-29, the Regional Director for the Seventh Region of the NLRB determined, on April 7, 1988, that the NLRB did not have jurisdiction over Residential Systems because of the nature of its relationship with the State of Michigan. Specifically, the Regional Director concluded that "meaningful bargaining by this employer is not possible because of the extensive control over its labor relations by the State of Michigan." The Regional Director cited National Transportation Services, 240 NLRB 565 (1979); and Res-Care Inc, 280 NLRB No. 78 (1986).

The same result was reached by the Regional Director for the Seventh Region in C.K. Homes, Inc, Case No. 7-RM-1275,

on February 14, 1986. The Employer in that case operated three homes for mentally disabled adults. The Regional Director concluded that:

> The control exercised by the State of Michigan over the Employer is beyond mere licensing regulations which also affect other health care institutions. Madison County Mental Health Center, Inc, 253 NLRB 258 (1980). While there is no evidence that the Employer was created by the State, it is clear that the Employer has no life independent of its symbiotic ties to the State of Michigan. The State has delegated its responsibility for these developmentally disabled individuals to the Employer and yet has retained substantial control over how the service is to be delivered and its labor costs.
>
> Thus, the Employer may be considered to be tantamount to an administrative arm of the government and not within the definition of Section 2(2) of the Act. In addition, the control possessed and exercised over the Employer's operations by the State of Michigan makes meaningful collective bargaining impossible. Target, Inc, 263 NLRB 781 (1987); Cf. Wordsworth Academy, 262 NLRB 438 (1982); The Krebs School Foundation, 243 NLRB 514 (1979). Accordingly, as the Board does not have jurisdiction over the Employer, I shall dismiss the petition.

We are first asked in the instant case to determine whether or not the State of Michigan is a joint employer because of its extensive control over the operations and budget of Louisiana.

The general characteristics of an employer, as set forth in Wayne County Civil Service v Wayne County Board of Supervisors, 22 Mich App 287, 177 NW2d 449 (1970), are:

> (1) that they select and engage the employee; (2) that they pay the wages; (3) that they have the power of dismissal; (4) that they have the power and control over the employee's conduct.

In Michigan Department of Mental Health, 1975 MERC Lab Op 983, a union filed refusal-to-bargain charges against the Wayne Center for the Retarded (WCR), the Wayne County Mental Health Services Board (the Board), and the Michigan Department of Mental Health. WCR was a private, non-profit corporation which

provided services to retarded citizens. In a previous representation petition brought under the LMA, the Commission had certified the unfair labor practice charges, the union asserted that the Board and the State Department of Mental Health were joint employers with WCR. WCR, the Board, and the State denied any employer relationship between the Board or the State and WCR employees.

We found that the Board was a joint employer with WCR but that the State Department of Mental Health was not. We found WCR and the Board guilty of unfair labor practices under the LMA and PERA respectively, but dismissed the charges against the Department of Mental Health.

Our finding in that case that the Board was a joint employer was appealed to the Court of Appeals in AFSCME, Michigan Council 7 v Department of

Health, 78 Mich App 416 (1977). The Court found that the Michigan Mental Health code, MCLA 300.1001, et seq, MSA 14.800(1) authorized Michigan counties to establish community mental health programs administered by a county community mental health board. The appellant Board in the case before it was a community mental health board created pursuant to that statute. The Court found that the Board was charged with planning, coordinating, funding and evaluating mental health services within the county. The Board was authorized to enter into contracts with public or private agencies or to provide mental health services directly through its own employees. The mental health program adopted by Wayne County was administered by the Board, the Court found, and funded principally with money furnished

by the State, with some county matching funds. The Board had entered into contracts with approximately 40 agencies, some public and some private, to provide services. WCR was one of the contracting agencies.

As found by the Court, WCR was wholly funded by the Board. The annual contracts between the Board and the WCR included "manning tables" with the names and classifications of the workers involved and their salary and fringe benefit allocations. The contracts, when executed, limited WCR to the pay schedule and position classifications set out in the contract. Any deviation from the manning table, including the abolition of positions or the failure to fill a vacant position, required Board approval. The Board monitored the operations of WCR to ensure fulfillment

of the contract, but the Board had no input into screening of employees, hiring, firing, or discipline.

The Court first dismissed the Board's argument that the Commission's order was improper since PERA did not obligate a public employer, such as the Board, to bargain with the employees of a private employer. The Court agreed, but noted that if the Board was in fact a joint employer with WCR, WCR employees were also public employees. Thus, the Board would be obligated to bargain with them under PERA. The Court then stated that it agreed with the Commission's conclusion that the Board was a joint employer in that case. Because the Board provided the funds for WCR's operation, determined the qualifications necessary for employment in a particular position, set the amount to be paid as

wages, and earmarked a certain amount of money for that purpose, the Board controlled to a large degree the wages and classifications of the people working at the WCR. Thus, the Court held, the Board was a joint employer even though it did not have the absolute power to hire or fire WCR employees and did not control their day-to-day activities.

In the instant case, the Department has extensive control over the hiring requirements of Louisiana although it does not physically hire its employees. It also exerts extensive control, though (sic) its rules and regulations, over the day-to-day operations of the home, including the type of work that is done, how it is done, and the conditions under which it is done. The Department has broader control over the discipline and discharge of Louisiana employees than

the Wayne County Mental Health Services Board had over the employees of WCR. The Department in this case not only provides the total funding for Louisiana's operation, (as was not the case in the Department of Health case discussed above), it effectively sets the wages and fringe benefit levels for Louisiana employees through the combination of staffing requirements and budget line items. We are compelled to conclude, as did the NLRB's Regional Director, that the Department's control over Louisiana's operations extends far beyond mere licensing requirements or the provision of funds through a grant arrangement. Since the Department and Louisiana effectively share authority over Louisiana's employees and their terms and conditions of employment, we conclude that Louisiana and the Depart-

ment are joint employers of these employees.

The second threshold question in this case is whether, if the Department of Mental Health is in fact a joint employer in this case, we have jurisdiction over it.

Section 2 of PERA defines "public employee" as:

> A person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service.

Section 4 of PERA states:

> The provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply in so far as the civil power exists in the legislature to control employment by the state or the emoluments thereof.

However, the Constitution of 1953, Article IV, Section 48, prohibit the

legislature from enacting laws providing for the resolution of disputes concerning state classified civil service employees. See Welfare Employees Union v Civil Service Commission, 28 Mich App 339. Employees of the state classified service are thus excluded from PERA. See Service Employees, Local 69 v State Racing Commission, 27 Mich App 676 (1970), where the Court of Appeals held that state-employed veterinarians were not covered by PERA even though they were not state classified employees. In that case, the State Civil Service Commission had been unaware of the veterinarians existence, and later moved to bring the veterinarians under state classification.

In Wayne County Veterans Trust Fund, 1977 MERC Lab Op 72, we distinguished State Racing Commission, supra, to hold

that employees of the Wayne County Veterans Trust Fund were covered by PERA. At the time of our decision in that case, the status of the Trust Fund had been the subject of conflicting Attorney General's opinions. Without attempting to resolve the question of whether the Trust Fund employees were or were not "state employees", we held that since they were undisputably not within the state classified service they were "public employees" covered by PERA.

In the instant case, the employees of Louisiana Homes, Inc., are not state classified employees, and there is no evidence that the State has any plans to bring them within the classified service. As noted above, we have concluded that the employees covered by the petition in this case are joint employees of Louisiana Homes, Inc., a private

employer, and the State Department of Mental Health. Since these employees are employees of the state but not state classified employees, they are employees within the meaning of PERA as well as the LMA.

DIRECTION OF ELECTION

In accord with the findings of fact and conclusions of law above, we conclude that Louisiana Homes, Inc., and the Michigan State Department of Mental Health are joint employers, under the LMA and PERA respectively, of direct care workers employed at Louisiana's three residential care homes. We also conclude that the appropriate unit for collective bargaining under Section 13 of PERA and Section 9(e) of LMA is the following unit:

> All full time and regularly scheduled part-time direct care workers, employed in the three homes operated by Louisiana Homes, Inc., and the State Department of Mental Health, at 1) 9601 St. Mary's Detroit,

Michigan 48227; 2) 614 Golden Gate, Detroit, Michigan; and 3) 3055 Hanley, Hamtramck, Michigan 48212, excluding administrators, department heads, and supervisors.

Pursuant to Section 12 of PERA and Section 27 of the LMA, and in accord with the attached direction of election, we direct an election in the above unit. Employees in this unit shall vote whether they wish to be represented by Michigan Council 25, American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
David S. Tanzman, Commission Chairman

/s/
Anne T. Patton, Commission Member

/s/
Thomas Roumell, Commission Member

Dated: JAN 27 1989

DIRECTION OF ELECTION

IT IS HEREBY ORDERED THAT AN ELECTION BY SECRET BALLOT SHALL BE CONDUCTED AMONG THE EMPLOYEES WITHIN THE UNIT OR UNITS FOUND TO BE APPROPRIATE IN THE COMMISSION'S DECISION ON THIS MATTER. THE CHOICES ON THE BALLOTS SHALL BE AS SET FORTH IN THE COMMISSION'S DECISION.

ELIGIBLE TO VOTE ARE THOSE EMPLOYEES WHO WERE EMPLOYED DURING THE PAYROLL PERIOD IMMEDIATELY PRECEDING THIS DIRECTION OF ELECTION, INCLUDING EMPLOYEES WHO DID NOT WORK DURING THAT PERIOD BECAUSE THEY WERE ILL, ON VACATION, OR TEMPORARILY LAID OFF. ALSO ELIGIBLE ARE THOSE EMPLOYEES IN THE MILITARY SERVICE OF THE UNITED STATES, IF THEY APPEAR AT THE POLLS.

INELIGIBLE TO VOTE ARE EMPLOYEES WHO HAVE QUIT OR BEEN DISCHARGED FOR CAUSE SINCE THE DESIGNATED PAYROLL PERIOD, AND

WHO HAVE NOT BEEN REHIRED OR REINSTATED BEFORE THE ELECTION DATE.

IT IS FURTHER ORDERED THAT THE EMPLOYER SHALL PREPARE AN ELIGIBILITY LIST IN A (SIC) ALPHABETICAL ORDER, CONTAINING ELIGIBLE VOTERS' NAMES AND ADDRESSES IN ACCORDANCE WITH THE ABOVE DESCRIPTION AND SUBMIT COPIES OF SUCH LIST FORTHWITH TO THE EMPLOYMENT RELATIONS COMMISSION AND TO THE OTHER PARTIES.

IT IS FURTHER ORDERED THAT THE ELECTION SHALL BE CONDUCTED ON THE PREMISES OF THE EMPLOYER AT SUCH TIME AND DATE AS A COMMISSION AGENT SHALL DETERMINE AFTER CONSULTATION WITH THE PARTIES.

IT IS FURTHER ORDERED THAT THE EMPLOYER SHALL CAUSE TO BE POSTED IN PROMINENT PLACES IN AND ABOUT THE PREMISES, SAMPLE BALLOTS AND NOTICES OF ELECTION (FURNISHED BY THE COMMISSION),

SETTING FORTH THE TIME, DATE, AND PLACE OF THE ELECTION AT LEAST FIVE (5) DAYS PRIOR TO SAID ELECTION.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION